SERVED: November 30, 1992

NTSB Order No. EA-3738

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of October, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. KENNETH JOSEPH D'ATTILIO, Respondent.	Docket SE-10905

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on August 1, 1990.[1] By that decision, the law judge found that the Administrator had proven that respondent violated section 91.9 (now 91.13(a)) of

[1]An excerpt from the hearing transcript containing the initial decision is attached.

the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).[2] Consequently, the law judge reduced the sanction imposed from a suspension of 60 to 20 days.[3] Respondent claims that, contrary to the findings of the law judge, he did not operate a helicopter in a careless manner so as to endanger the property of another. He asserts that the law judge's decision rests on inherently incredible testimony. For reasons set forth below, we deny respondent's appeal.

The Administrator alleged that, while carrying passengers in a Hughes 500D helicopter to the Miloli'i Valley State Park on the island of Kauai, Hawaii, respondent landed the aircraft in close proximity (within 60 feet) of tents on the ground, overturning one and destroying another. The helicopter landed in a clearing near the cabin where respondent's passengers planned to stay. It was established through witness testimony that there were two tents in the area: a domed tent, which respondent admitted seeing from the air, and an A-frame pup tent, which respondent testified he did not see, set up between two trees. One witness (Ms. Brodie) stated that she was sitting outside the A-frame tent when

---

[2]The other charges of the complaint alleging violations of sections 91.79(d) (now 91.119(d)), 135.5, 135.293(a), 135.299(a), and 135.343 were dismissed at the hearing.

Section 91.9 read as follows:

"Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator did not appeal the dismissal of the charges or the reduction in sanction.

the helicopter began its approach. She claimed that the helicopter "appeared to be coming in very rapidly and very low" (Tr. at 67), blowing sand and dirt around, and as the helicopter passed over her, the tent "ripped to shreds." (Tr. at 69). It landed, in her estimation, about 30 to 40 yards away.[4] One of the helicopter passengers, however, testified that she saw the A-frame tent after they landed and it did not appear to have been damaged. In addition, an expert witness testifying for respondent opined that the A-frame tent could not have been torn by the rotor wash from this aircraft.

Another witness who was nearby when the helicopter landed stated that the domed tent blew over and rolled several times. This witness also claimed that the domed tent had been staked into the ground approximately 30 feet from where the helicopter alit. Respondent contradicted this statement, saying that when the helicopter landed, the domed tent was about 60 feet away and was not anchored to the ground. Both he and his expert witness testified that the domed tent must have been toppled by the wind because, in their opinions, the rotor wash would not have reached that far.

The Administrator also maintained that there was a marked helipad nearby. It was revealed through uncontroverted evidence that the helipad was actually a grassy area bordered by white rocks, some of which had been removed or obscured from sight.

[4]A passenger on the helicopter estimated that the A-frame tent was about 70 to 80 feet from the helicopter.

Admitted into evidence was the permit from the Hawaii Department of Land and Natural Resources allowing the helicopter to land at Miloli'i, with instructions to "use heliport by milo trees--marked with white [borders]."

Based largely on Ms. Brodie's testimony, the law judge decided that some damage to property in fact resulted from the incident and, more specifically, that respondent should have made a more careful approach into the area.

After considering the briefs of the parties and the record below, we have concluded that safety in air commerce or air transportation and the public interest require affirmation of the law judge's decision.

In deciding this case, the critical issue becomes whether the law judge's conclusion that the rotor wash from the helicopter approach damaged the A-frame tent is supported by a preponderance of the reliable, probative, and substantial evidence. Such a finding rests on an evaluation of witness credibility, and "`unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge.'" Administrator v. Smith, 5 NTSB 1560, 1563 (1986), quoting Administrator v. Kocsis, 4 NTSB 461, 465 n. 23 (1982). Several witnesses told conflicting accounts of the incident and as such, it was the law judge's responsibility, based on all the evidence available to him, to determine which version of the events he found to be the most believable and to render a decision accordingly. Therefore, in order to succeed in his appeal,

respondent must show that, based on the information adduced at the hearing, the law judge's conclusions were arbitrary and capricious. We believe respondent has not met this burden.

First, respondent asserts that, based on the evidence, the result reached by the law judge is incorrect. He claims that the law judge's findings rest solely on the testimony of one "interested" witness whose version of the facts is implausible, as well as unreliable.[5] We disagree. A law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations ... were put forth...." Administrator v. Klock, NTSB Order No. EA-3045 at 4 (1989). As we have long acknowledged, issues of credibility are, by nature, highly subjective. Administrator v. Walker, 3 NTSB 1298, 1299 (1978). Some deference must, of necessity, be given to the law judge, since he was in the best position to observe and evaluate the demeanor of each witness.[6] We do not believe

[5]Respondent asserts that this witness was an interested party because her father-in-law (another witness in the case) had a long-standing animosity towards one of the passengers on the flight and was the instigator of the complaint that brought this matter to the attention of the FAA. We do not view this situation as sufficient impetus to create an inference that the witness lied at the hearing.

When determining witness credibility, law judges have the discretion to give more weight to one witness' testimony over another's, whether it is self-serving or not, "so long as the interests and motivations which could influence or color a witness' testimony are reasonably apparent on the record...." Administrator v. Calavaero, 5 NTSB 1099, 1100 (1986). "There is no presumption in the law that a witness who has or may have a personal stake in the outcome of a proceeding will not testify truthfully." Id. n. 7.

[6]To support his position, respondent cites Administrator v. Powell, 4 NTSB 642 (1983), a case where we reversed the law judge

that the law judge espoused a version of the facts that was inherently incredible and thus we decline to disturb his findings.

Respondent also argues that under Administrator v. Reynolds, 4 NTSB 240 (1982), in order to establish a violation of section 91.9, the Administrator was required to prove the likelihood of potential harm was unacceptably high or respondent's judgment was clearly deficient. Again, we must disagree. It was alleged in Reynolds that the respondent acted carelessly, in violation of section 91.9, by operating a helicopter too closely to a flagpole, even though no harm resulted from the incident. The Board found that the Administrator did not prove the charge by a preponderance of the evidence, stating that

> "a helicopter pilot must almost continually exercise what is essentially a subjective judgment ... to ensure safe operation. Having entrusted such judgment to the pilot, the Administrator, where he believes a specific operation, which in fact occasioned no adverse consequences, did not involve a sufficient margin of safety, cannot prove a violation of section 91.9 simply by showing the potential harm that could have resulted from a circumstance, such as collision with a flagpole, that did not occur."

Id. at 242 (emphasis added). In the instant case, the law judge found that there were adverse consequences to respondent's actions: namely, the damage to Ms. Brodie's tent.

(..continued)
who relied on testimony that, in our assessment, "strain[ed] belief to the point of being inherently incredible." Id. at 645. The instant case is inapposite, however, in that the law judge's decision to believe the testimony of Ms. Brodie was not a decision made in an "arbitrary or capricious manner."

Through his testimony, respondent revealed that he saw the domed tent when he flew over the area on approach, but saw no people or other tents in the vicinity. He claimed that he never saw the other tent, as it was obscured by trees. Given the circumstances, it would have been logical, as well as safe, for respondent to infer that if he saw one tent then, very likely, there were people in the area and, quite possibly, there were other tents hidden from view as well. He maintains that his visual survey of the area was impeded by tree cover. That fact, however, is all the more reason why he was careless in landing at the site, especially when there was a suitable landing area close by. Therefore, it is our conclusion that respondent exercised poor judgment.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as modified by the initial decision, is affirmed; and

3. The 20-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[7]

VOGT, Chairman, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. COUGHLIN, Vice Chairman, and Member LAUBER did not concur. Member LAUBER submitted the following dissenting statement in which the Vice Chairman joins.

[7]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).

Notation 5870
October 27, 1992

MEMBER LAUBER, DISSENTING:

Based on a review of the evidence I cannot agree with the decision of the majority in this case. I agree with the Respondent that the Law Judge's decision was based on inherently incredible testimony.

The ALJ recognized that the testimony of Rosalyn Brodie was critical to this case (Oral Initial Decision and Order, Page 3, Line 13), and that the only issue on trial here was whether the landing was a "careless operation so as to endanger property. I don't think there was any testimony, nor were there any allegations about, danger to or damage to persons." (Oral Initial, Page 3, Lines 9-12; emphasis added) . Furthermore, he recognized that the parties themselves had stipulated that the "helipad" was not an issue. (Oral Initial, Page 2, Line 18) .

Brodie testified that-her A-frame tent was "ripped to shreds." (Tr. , Page 69, Line 12). Hers was the only testimony to that effect, and was directly contradicted by other witnesses, including Ms. Erickson and Mr. Ishikawa, two of the passengers in the helicopter. However, the ALJ accepted Brodie's version on the basis that, "The portion of the tent that was toward the helicopter, that would be visible from the helicopter, was that portion of the tent that was still standing." (Oral Initial, Page 4, Line 17).

Exhibit R-1 is an aerial photograph of the landing site. During trial, witnesses were asked to indicate, among other things, the location of the tents and the helicopter. During cross examination, Brodie was asked to indicate the location and orientation of the A-frame tent allegedly "ripped to shreds." (See Tr., Page 79). Examination of R-1 readily reveals that, according to Brodie's own testimony, passengers on or in the vicinity of the helicopter would have had nearly a full side view of the tent, not a rear view as mistakenly believed by the ALJ. On this basis alone, I think that Brodie's testimony is incredible.

In addition, I think there are other troublesome aspects of Brodie's testimony. I cannot agree that her relationship (daughter-in-law) to the principal antagonist in this case (Alexander Brodie) is irrelevant. Nor do I take comfort in the failure of the Administrator, through Brodie, to produce photographic evidence which supposedly exists regarding alleged damage to the tent.

Review of the testimony of both expert witnesses, especially that of the FAA's own expert, provides convincing evidence that it is highly unlikely that rotor downwash could have resulted in damage to either tent, given their locations with respect to the helicopter and its flight path, winds on the day of the incident, and the characteristics of the helicopter itself. It is also illuminating to review the testimony of both experts, and again, especially that of the FAA's expert, with regards to D'Attilio's prudence and judgment in his selection of the landing site. Wright, for example, refused to testify that a landing under the circumstances established in trial would be imprudent (Tr. Pages 172-175) .

In short, the preponderance of reliable, substantive and probative evidence in this record does not support a finding of careless operation so as to endanger the property of others. I would grant the Respondent's appeal.

John K. Lauber

Notation 5870

VICE CHAIRMAN COUGHLIN, dissenting:

Having formally dissented with the decision of the majority in this case, I would like to associate myself with the dissenting statement submitted by Member Lauber.